KHAIRY JAMALUDDIN ABU BAKAR v. MOHD RASYIQ MOHD ALWI

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-23CY-4-01-2022]
8 NOVEMBER 2022

Abstract – *Failure to seek leave of court before late filing of statement of defence and amended statement of defence amounts to an abuse of the court's process, warranting the court to strike out the defence under O. 18 r. 19(1)(d) of the Rules of Court 2012.*

CIVIL PROCEDURE: *Striking out – Application for – Procedural non-compliance – Entering late appearance – Defendant served with writ and statement of claim but did not file appearance within 14 days – Defendant filed appearance three months after writ was served – Whether obtained leave of court – Whether statement of defence and amended statement of defence ought to be struck out or set aside – Rules of Court 2012, O. 12 r. 5(2), O. 18 r. 19(1)(d) & O. 92 r. 4*

The plaintiff sued the defendant over some allegedly defamatory statements authored and published by the defendant. The defendant was served with the writ and statement of claim ('SOC') on 5 February 2022 and had 14 days to file his memorandum of appearance *ie*, by 18 February 2022. However, the defendant only filed his appearance three months after the writ was served, which was on 25 May 2022. The defendant then filed his statement of defence ('SOD') on 14 June 2022, followed by the amended SOD on 27 June 2022. The plaintiff complained of procedural non-compliance on the part of the defendant, namely that the latter entered a late appearance despite the fact that the writ and SOC were properly served on him. According to the plaintiff, the defendant should not have filed the SOD and the amended SOD without first obtaining the court's leave. In the present application, the plaintiff sought an order that the defendant's SOD and amended SOD be struck out or set aside, pursuant to O. 18 r. 19(1)(d) and/or O. 12 r. 5(2) and/or O. 92 r. 4 of the Rules of Court 2012 ('ROC') on the grounds that, *inter alia*, the pleadings were an abuse of the court's process.

Held (allowing application):

(1) The plaintiff had met the requirements of personal service of the writ and SOC on the defendant, in accordance with O. 10 r. 1(1) and O. 62 r. 3 of the ROC. In spite of the fact that the writ and SOC were served on his mother, the defendant had acknowledged receipt of the documents and was aware of their nature. As a result, the defendant was made aware of the legal proceedings initiated against him and what was

A required of him. The writ and SOC were properly served on the defendant. This was evident from: (i) the defendant's response through WhatsApp messages; and (ii) his own conduct when he posted a post on his Instagram account after receiving the writ and SOC in which he declared that he intended to countersue and dispute the plaintiff's action
B against him. (paras 21, 22, 24 & 25)

(2) The filing of the defendant's defence fell outside the 14-day period after the appearance was filed. As a result of his late appearance, the defendant was not permitted to serve his defence without the court's leave, in accordance with O. 12 r. 5 of the ROC. According to this
C provision, although an appearance can be entered after the time limited for appearance and before judgment, leave must first be obtained from the court in order to extend the time to serve the defence. As of the date of hearing this application, there had never been an application by the defendant for leave to extend the time to serve the defence. The court
D should not assist a litigant who had slept on his rights, in this case, the defendant, who was given numerous opportunities to enter his appearance. Consequently, the filing of the SOD and the amended SOD without leave constituted an abuse of the court's process. The SOD and amended SOD ought to be struck out. (paras 28, 29, 32 & 41)

E **Case(s) referred to:**

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Hong Leong Finance Bhd v. Pasir Permata Sdn Bhd & Ors [1989] 1 CLJ 939; [1989] 1 CLJ (Rep) 598 HC ***(refd)***

Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd [2007] 2 CLJ 370 HC ***(refd)***

F *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA* ***(refd)***

Kerajaan Negeri Kelantan & Anor v. Wong Meng Yit & Ors [2012] 6 CLJ 357 CA ***(refd)***

Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Tan Chin Woh v. Zulkarnain Dato Sheikh Ahmad & Ors [2004] 1 LNS 6 HC ***(refd)***

Wan Mohd Sofian Wan Md Saad v. MBf Finance Bhd [2000] 1 CLJ 492 HC ***(refd)***

G *Yong Weoi Kee v. Savelite Engineering Sdn Bhd [2016] 1 LNS 1047 HC* ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 9 r. 4, O. 10 r. 1(1), O. 12 r. 5(2), O. 18 r. 19(1)(d), O. 62 r. 3

H *For the plaintiff - Abdul Rashid Ismail, Siti Nuram Md Zahidi & Nur Nadia Ahmad Jaidi; M/s Rashid Zulkifli*

For the defendant - Noor Adzrie Mohd Noor; M/s Nurul Hafidzah & Assocs

Reported by Najib Tamby

I

JUDGMENT
(Encl. 45)

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

[1] This action involves the plaintiff, who is the Minister of Health, suing the defendant, an Islamic preacher, over some alleged defamatory statements allegedly authored and published by the defendant. In the course of the proceedings, the plaintiff complained of some procedural non-compliance on the part of the defendant. The plaintiff contends that the defendant entered a late appearance despite the fact that the writ and statement of claim were properly served on him. The plaintiff further contends that, under these circumstances, the defendant should not have filed the statement of defence and amended statement of defence without first obtaining this court's leave.

[2] As a result, the plaintiff is now applying by way of encl. 45 for an order that the statement of defence dated 14 June 2022 ("statement of defence") and amended statement of defence dated 27 June 2022 ("amended statement of defence") be struck out or set side pursuant to O. 18 r. 19(1)(d) of the Rules of Court 2012 and/or O. 12 r. 5(2) of the Rules of Court 2012 and/or O. 92 r. 4 of the Rules of Court 2012 on the grounds that, amongst others, the pleadings are an abuse of the process of the court.

An Overview Of The Background Facts

[3] At the height of the COVID-19 pandemic between 10 March 2020 and 16 August 2021, the plaintiff served as Minister of Science, Technology and Innovation ("MOSTI"). This role entailed the following responsibilities for the plaintiff:

(i) facilitating science diplomacy towards securing a vaccine for COVID-19;

(ii) overseeing the National Science Policy to encourage the development of science in Malaysia;

(iii) championing technology adoption acceleration across the public and private sectors, including the creation of the National Innovation and Technology Sandbox;

(iv) co-chairperson of the Digital Economic Task Force together with the Minister of Communications and Multimedia;

(v) chairperson of the National Innovation and Technology Sandbox Working Committee; and

(vi) committee member of the National Food Security Council.

[4] During the plaintiff's tenure as Minister for MOSTI, the plaintiff served as the Co-Chair of 'Jawatankuasa Khas Jaminan Akses Bekalan Vaksin COVID-19 ("JKJAV")' together with the then Minister of Health. JKJAV was established in order to ensure that the COVID-19 vaccines could be obtained in a prompt, safe and effective manner.

[5] At the same time, the plaintiff was also appointed by the cabinet to act as the Coordinating Minister of the National COVID-19 Immunisation Programme ("NIP") and to lead the COVID-19 Immunisation Task Force ("CITF"). CITF was assigned the responsibility of coordinating the implementation of NIP with regard to aspects other than health services. This included issues relating to logistics and coordination with Government agencies and states.

[6] Through the CITF, the plaintiff led the nation's efforts to immunise Malaysians against the COVID-19 pandemic and amongst the duties the plaintiff was tasked with and/or involved in were:

(i) to plan, implement and monitor supply and distribution of vaccines, vaccination registration and the operations of "Pusat Simpanan Vaksin" ("PSV") and "Pusat Pemberian Vaksin" ("PPV") as well as managing risks throughout the implementation of the NIP;

(ii) to appoint and mobilise members, experts and consultants from the Government and private sectors for the implementation of the NIP;

(iii) to provide necessary solutions and interventions to key issues and challenges associated with the implementation of the NIP; and

(iv) to report periodically to the Cabinet, the National Security Council and the Government about CITF's progress.

[7] Returning to the present issues, the alleged defamatory statements allegedly authored and published by the defendant were directly related to the plaintiff's roles and responsibilities as explained above. It also relates to the plaintiff taking a prominent role in leading Malaysia's vaccination programmes.

[8] As a starting point, the plaintiff claims that the defendant owns and manages the following social media accounts:

(i) an Instagram account by the name of Ustaz Abu Syafiq with the username @ustazabusyafiq ("Instagram page") that has 30,305 followers as at 21 January 2022; and

(ii) a Facebook account by the name of 'Rasyiq Alwi' ("Facebook page") that has 9,169 followers as at 21 January 2022.

[9] According to the plaintiff, the defendant has never shied away from making controversial remarks. In 2021, he questioned the halal status of a large international fast-food chain, later retracting his remarks and apologising. The defendant also appeared to have made claims of being unvaccinated as well as bringing unvaccinated travellers to perform umrah. In addition, he was reported to have made comments about Ministers not getting vaccinated.

[10] There appears to be no end to the defendant's controversial activities. As a result of a series of events, the plaintiff alleges that the defendant has shifted his focus to vaccination programmes in Malaysia and the plaintiff's efforts to address vaccination hesitancy and anti-vaccine sentiments. The defendant allegedly published the following defamatory statements on his Instagram and Facebook pages.

(i) On 20 October 2021, the following statements were made on his Instagram page:

(a) "Assalamualaikum, ok, saya nak sanggah dengan jelas, by quote, Kementerian Kesihatan Malaysia dan menterinya, Khairy Jamaluddin pada status Twitter dan juga media sosial yang dikeluarkan tadi. Mereka mengatakan nak pergi umrah mesti ambil dos yang ketiga. Ini tak betul, salah dan bercanggah dengan fakta."

(b) "Jadi kenyataan KKM dan Khairy Jamaluddin, saya sebut nama ni dua-dua, adalah salah dan bercanggah dengan apa yang dibenarkan oleh kerajaan Saudi. So jangan, please, siapa-siapa pun, saya ke siapa-siapa, jangan menipu rakyat. Please!"

(c) "Dahlah banyak data ditipu, ini pula fakta pula yang ditipu"

(ii) On 6 January 2022, he posted the following on Instagram:

(a) KJ tipu rakyat Msia lagi. KJ dakwa dia suntik Booster pada bulan 9. Sedangkan Booster hanya bermula pada 13 Oktober.

#KhairyJamaluddinGagalSilaLetakJawatan

(iii) In his video posts on Instagram and Facebook on 6 January 2022, he said:

(a) Assalamualaikum, salam sejahtera daripada bumi Mekah, untuk khas YB Khairy Jamaluddin, Menteri Kesihatan. Saya mewakili seluruh rakyat Malaysia memohon supaya YB Khairy meletakkan jawatan kerana terlalu banyak sangat kegagalan. Pencapaian YB tu, semuanya, kalau result exam tu, E E E E E E E, semuanya E. Pencapaian yang capainya adalah kegagalan. Maknanya mencapai menu kegagalan. Itu kejayaan YB.

A (b) Jadi saya minta dengan banyak isu vaksin yang entah apa-apa, kemudian umrahlah, kemudian sekarang ni YB dikatakan tidak update berkaitan dengan semakan vaksin, macam-macam isu yang besar, yang membabitkan nyawa, yang membabitkan kesihatan. Gagal semua YB.

B (iv) On 6 January 2022, the defendant posted this on Instagram:

(a) KJ tak Vaksin. Ramai ahli keluarga dia pun tak Vaksin. Cuba semak

(v) In an Instagram post on 10 January 2022, the defendant wrote:

C (a) Magic. Gi Google. Tulis; – 8 Oktober 2021 – Khairy – Dos Penggalak. NPRA Situ bukti KJ Palsukan My Sejahtera dia Cubalah! * Booster. NPRA baru lulus Oktober. September KJ dakwa dah cucuk. Haha

(vi) This is what the defendant posted on his Instagram account on D 10 January 2022:

(a) KJ tipu sijil vaksin;

(b) KJ dakwa dia booster pada September

(vii) This is what the defendant posted on Instagram on 10 January 2022:

E (a) Kita tunggu semua anak-anak menteri dan cucu-cucu para menteri tunjuk anak cucu mereka betul2 Vaksin ke tak? Jangan tipu sijil mcm KJ sudah le ... Ckp cucuk Booster bulan 9 padahal bulan 10 baru diluluskan NPRA. Tak sah akad tu ... hihi"

F (viii) He posted a final statement on his Instagram page on 10 January 2022:

(a) Nama Kery ada tak dim list Sijil Vaksin Palsu tu? Sebab dia edit Haribulan September dia kata dia Booster. Padahal Booster baru mula bulan Oktober. Sy dah semak. Nama sy takde. Hahaha.

[11] It is now alleged by the plaintiff that all those statements above are G false and maliciously made about the plaintiff, thus defamatory.

The Parties' Positions

[12] The plaintiff's application outlines three main grounds why those pleadings are an abuse of the process of the court and, therefore, ought to be H struck out.

[13] First, the writ and statement of claim have been duly served on the defendant on 5 February 2022 together with a cover letter dated 4 February 2022. These documents had been served by hand at the defendant's residential address at Batu 18, Kampung Paya Pasir, Jalan Temerloh-Maran, I 26500 Maran, Pahang and had been duly received by his mother, one Puan Hajjah Azizah Khatib Mat ("Puan Hajjah Azizah"). Puan Hajjah Azizah

appeared to have agreed to receive the sealed writ and statement of claim by signing the cover letter dated 4 February 2022 acknowledging receipt. The plaintiff's solicitors were informed by Puan Hajjah Azizah that the defendant was in Mecca at the time of service and that she was unaware of when he would return. Puan Hajjah Azizah said that when the defendant returned from Mecca, he would come back to that address since that is where he resides. Puan Hajjah Azizah then informed the plaintiff's solicitors that she would notify the defendant about the service of the sealed writ and statement of claim.

[14] On 5 February 2022, the defendant sent WhatsApp messages to the plaintiff's solicitors, demonstrating that he had taken notice of the service of the writ and statement of claim. He was aware that the documents the plaintiff's solicitors served on his mother were copies of the writ and statement of claim. These messages included, amongst others, the following statements:

(a) Saya baru dimaklumkan pihak Tuan ada menghantar Notis Saman YB Khairy Jamaluddin Abu Bakar ke atas saya dan diserahkan kepada Ibu saya.

(b) Saya juga ingin nyatakan bahawa saya tidak dapat hadir ke Mahkamah pada tarikh yang dimaklumkan.

(c) Saya juga ingin maklumkan tidak melantik peguam dalam isu ini kerana saya berada di luar negara

[15] Secondly, the plaintiff argued that the defendant entered a late appearance despite those documents being properly served on him. It is submitted on behalf of the plaintiff that after the service of the writ and statement of claim on 5 February 2022, the defendant only filed the appearance on 25 May 2022. This was three months after the service of the writ and statement of claim on him. Consequently, the defendant could not file a defence unless the court orders otherwise. In other words, the defendant failed to obtain leave from the court before filing and serving his statement of defence and amended statement of defence.

[16] Thirdly, the defendant's failure to seek leave from this court amounts to an abuse of the court's process.

[17] On the other hand, the defendant argued that he was not served with the writ and statement of claim until 17 May 2022. His argument is that the writ and statement of claim had never been served on him prior to that date. According to the defendant, he was in Mecca at the time of the alleged service. In fact, he had asked the plaintiff's solicitors to send the letter of demand or writ and statement of claim to his email by providing the correct email address, but the plaintiff's solicitors nevertheless sent it to a different email address, which was not his. Additionally, the defendant had never

appointed an agent to receive the writ and statement of claim on his behalf. Since the writ and statement of claim were served on him through his solicitors only on 17 May 2022, therefore the memorandum of appearance filed on 25 May 2022 was within time. Since the statement of defence was filed on 14 June 2022, it was filed on time and did not require leave of court.

Findings By The Court

[18] A writ must be served personally on a defendant. As an alternative, it can also be sent by prepaid A.R. registered post addressed to the defendant's last known address. The relevant provisions relating to the service of a writ and statement of claim are found in O. 10 r. 1 and O. 62 r. 3 of the Rules of Court 2012.

[19] Order 10 r. 1(1) of the Rules of Court 2012 provides for the following provision:

> General provisions (O. 10, r. 1)
>
> 1(1) Subject to the provisions of any written law and these Rules, a writ shall be served personally on each defendant or sent to each defendant by prepaid A.R. registered post addressed to his last known address and in so far as is practicable, the first attempt at service must be made not later than one month from the date of issue of the writ.

[20] Meanwhile, O. 62 r. 3 of the Rules of Court 2012 provides that:

> Personal service: How effected (O. 62, r. 3)
>
> 3. Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him:
>
> (a) in the case where the document is a writ or other originating process, the sealed copy; and
>
> (b) in any other case, an office copy.

[21] After reviewing the facts presented by the parties herein, this court finds that the plaintiff has met the requirement of personal service of the writ and statement of claim on the defendant in accordance with O. 10 r. 1(1) and O. 62 r. 3 of the Rules of Court 2012.

[22] In spite of the fact that the writ and statement of claim were served on his mother, the defendant had acknowledged receipt of the documents and was aware of their nature. As a result, the defendant was made aware of the legal proceedings initiated against him and what was required of him.

[23] It goes without saying that the whole point of serving the writ and statement of claim was to inform the defendant that legal proceedings had already been commenced against him. Siti Norma Yaakob J (later CJM)

made this significant legal proposition in the case of *Hong Leong Finance Bhd v. Pasir Permata Sdn Bhd & Ors* [1989] 1 CLJ 939; [1989] 1 CLJ (Rep) 598 in which Her Ladyship held at p. 599:

> The whole purpose of serving a writ and statement of claim is to make a defendant aware of the fact that legal proceedings had already commenced against him and that he is entitled within the time limited in the writ, to enter an appearance and make his defence but in default of him doing so, the plaintiff may proceed to enter judgment and levy execution against him. I consider that this purpose was achieved when the office boy disappeared into the 3rd defendant's office with 2 copies of the writ and statement of claim. It is not disputed that the 3rd defendant was in office at the material time and the office boy must have handed the documents to him with directions that the 3rd defendant acknowledge on one copy. The fact that the 3rd defendant refused to do so but chose instead to play hide and seek must work to his detriment as all the process server is expected to do is to bring the writ and statement of claim to the knowledge and attention of the 3rd defendant. The fact of the acknowledgement of service is nothing more than to confirm knowledge of the existence of legal proceedings had been parted to the 3rd defendant and to avoid any possible allegation of non-service.

[24] In light of this, the writ and statement of claim were properly served on the defendant. Based on the defendant's response through the WhatsApp messages mentioned above, which he initiated on the very same day the service was effected on him, it is evident that this is indeed the case. The defendant has expressly and clearly acknowledged that a legal process has been initiated against him. The service of process on him was therefore proper.

[25] Further, the defendant's knowledge of the service of the writ and statement of claim on him can also be inferred from his own conduct on 8 February 2022 when he posted a post on his Instagram account after receiving the writ and statement of claim on 5 February 2022, in which he declared that he intends to countersue and dispute the plaintiff's action against him, stating the following:

> Saya pun akan lawan KJ kat Mahkamah Tinggi. Bukan Mahkamah Dunia jek. Mahkamah Akhirat pun saya akan tuntut. Dia ingat kita takut ke!? Ramai nyawa yg melayang banyak badan yg rosak. Ribuan keluarga hilang punca. Ini peluang saya tibai dia kaw2!

[26] In light of the situation, the plaintiff has fulfilled the requirement for personal service on the defendant. In such circumstances, he cannot be said to have been unaware of the service of process. In no way should he be allowed to claim that he was only served with the writ and statement of claim on 17 May 2022. Allowing him to take this position would undermine the very fundamental fact that he had in fact duly acknowledged the service of those documents on him even through his mother.

[27] Further support for this position can be found in the views expressed by Low Hop Bing J (as His Lordship then was) in *Tan Chin Woh v. Zulkarnain Sheikh Ahmad & Ors* [2004] 1 LNS 6; [2004] MLJU 6 in which His Lordship held that personal service was sufficient under O. 10 r. 1(1) of the Rules of Court 2012 read together with O. 62 r. 3 of the Rules of Court 2012 so long as the defendant was personally made aware of the service of a writ on him. This authority, therefore, eliminates the necessity of personally handing the writ to the defendant. His Lordship expressed the following at pp. 23 & 24:

> In my view, the purpose of effecting personal service of the writ is to bring notice to the person to be served *ie*, the second defendant herein that the action has been taken against him, so that he can decide whether to defend or not to defend the allegations, averments and the remedy or relief against him. In other words, so long as the writ has been effectively brought to his attention personally, it is sufficient to constitute personal service under O. 10 r. 1(1) read with O. 62 r. 3. It is not necessary that the writ be handed personally to the second defendant.
>
> In *Hong Leong Finance Bhd v. Pasir Permata Sdn Bhd & Ors* [1989] 1 CLJ 939, the plaintiff's process server went to the third defendant's office to serve the writ, but the third defendant refused to see the process server or to acknowledge receipt of the writ, which was then served on the third defendant's secretary. Siti Norma J (now FCJ) held that there was good personal service of the writ on the third defendant as it was not necessary for the process server to hand the writ personally to the third defendant.

[28] Having established the validity of the process of service, the next issue for determination is the defendant's late appearance. In light of the fact that the defendant was served with the writ and statement of claim on 5 February 2022, he had 14 days to file his memorandum of appearance, *ie*, by 18 February 2022. Unfortunately, the defendant did not file his appearance until three months after the writ was served, which was on 25 May 2022. The defendant then filed his statement of defence on 14 June 2022, followed by the amended statement of defence on 27 June 2022. In addition, the filing of the defence also falls outside the 14-day period after the appearance was filed.

[29] As a result of his late appearance, the defendant was not permitted to serve his defence without the court's leave. This is in accordance with O. 12 r. 5 of the Rules of Court 2012 which specifically states:

> Late appearance (O. 12, r. 5)
>
> 5(1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court.
>
> (2) Except as provided by paragraph (1), nothing in these Rules or any writ or order thereunder shall be construed as precluding a defendant from entering an appearance in an action after the time limited for appearing,

> but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.

[30] According to this provision, though an appearance can be entered after the time limited for appearance and before judgment, leave must first be obtained from the court in order to extend the time to serve the defence. On this issue, Kamalanathan Ratnam J said the following in *Wan Mohd Sofian Wan Md Saad v. MBf Finance Bhd* [2000] 1 CLJ 492; [2000] 5 MLJ 319 at p. 323:

> Whilst the defendant had by its own admission entered appearance a day late, there is no provision in the RHC that disallows a defendant from doing so. The rule governing late entering of appearance is O. 12 r. 5 which reads as follows:
>
> > (1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court.
> >
> > (2) Except as provided by paragraph (1), nothing in these rules or any writ or order thereunder shall be construed as precluding a defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.
>
> Therefore it is clear that a defendant is only precluded from entering appearance after judgment has been entered unless he has the leave of the court. But in this case, the plaintiff failed to act with promptitude. The only effect upon a defendant who enters appearance late is that he cannot, without the consent of the court, serve a defence or do anything else any later than as if he had entered appearance within time. Therefore, it is my judgment that the defendant was perfectly entitled to enter the late appearance since judgment had not as yet been taken on that date.

[31] In *Yong Weoi Kee v. Savelite Engineering Sdn Bhd* [2016] 1 LNS 1047; [2016] MLJU 657, Hashim bin Hamzah J (as His Lordship then was) echoed this position in which His Lordship further emphasised that obtaining the court's consent before filing a defence would allow the court to determine if it is just to grant such consent based on the facts of each case.

> [8] Two circumstances were prescribed by the Rules of Courts 2012 to be considered as late appearances namely an appearance after a judgment has been entered or an appearance at any time after the time limited for appearing. It can be seen under O. 12 r. 5 of the Rules of Courts 2012 which provides as follows:

A (1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court.

(2) Except as provided by paragraph (1), nothing in these Rules or any writ or order thereunder shall be construed as precluding a
B defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time. (emphasis added)

C [9] The relevant limb in the present case would be under O. 12 r. 5(2) of the Rules of Courts 2012 since no judgment has been entered yet against the seventh defendant.

[10] Kamalanathan Ratnam J (as he then was) in the case of *Wan Mohd Sofian bin Wan Md Saad v. MBF Finance Bhd* [2000] 5 MLJ 319, HC, had simplify the application of O. 12 r. 5(2) of the Rules of Courts 2012 above
D into the following words at p. 323, namely:

Therefore it is clear that a defendant is only precluded from entering appearance after judgment has been entered unless he has the leave of the court. But in this case, the plaintiff failed to act with promptitude. The only effect upon a defendant who enters appearance late is that he
E cannot, without the consent of the court, serve a defence or do anything else any later than as if he had entered appearance within time. (emphasis added)

[11] Therefore, the defendant who entered late appearance must obtain the Court's consent before he can file any defence. The Court will then
F have to assess each case on its own facts whether it is just to give such consent.

[32] As of the date of hearing this application, there has never been an application by the defendant for leave to extend the time to serve the defence. There has also been no attempt to set aside the *ex parte* injunction obtained
G by the plaintiff or to oppose the *inter partes* injunction application that led to the court granting the injunction on 17 February 2022 in the absence of the defendant. This court agrees with the plaintiff that it should not assist a litigant who has slept on his rights, in this case the defendant, who was given numerous opportunities to enter his appearance. Consequently, the filing of the statement of defence and amended statement of defence without leave
H constitutes an abuse of the court's process.

[33] As indicated above, the plaintiff's solicitors repeatedly reminded the defendant, as early as 14 February 2022, of this case and the date set for the *inter partes* hearing of the plaintiff's application for injunctive relief. Despite
I the plaintiff's solicitors sending him WhatsApp and email messages, the defendant has remained silent. On 1 March 2022, the plaintiff's solicitors also served on the defendant a sealed order dated 17 February 2022 relating

to the plaintiff's application for injunctive relief which the defendant did not acknowledge or reply to despite receiving it. The plaintiff's solicitors sent another letter on 14 April 2022, giving the defendant seven days' notice, informing the defendant that if the plaintiff's solicitors do not hear from the defendant as to whether the defendant intends to defend the action, judgment in default will be sought against him by the plaintiff's solicitors. Instead, the plaintiff's solicitors received a letter dated 21 April 2022 from the defendant's newly appointed solicitors requesting to have all cause papers filed in this action forwarded to them. On the plaintiff's part, since no appearance or indication to defend the action has been received by the plaintiff within seven days from 14 April 2022, the plaintiff then filed an application for judgment in default of defence ("JID") which has since been withdrawn to allow the plaintiff to focus on this current application. It was not until after the plaintiff filed and served the JID application on 20 May 2022 that the defendant filed his appearance, which is clearly a late appearance.

[34] In the eyes of this court, there should be no tolerance for a lackadaisical attitude. In holding so, the court refers to the judgment of Abdul Malik Ishak J (as His Lordship then was) in *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd* [2007] 2 CLJ 370 where His Lordship observed that the court should not assist litigants who have slept on their rights. The following is what His Lordship said at p. 391:

> [12] There must be a time limit for enforcing or claiming a right. It is for this reason that the Limitation Act 1953 (Act 254) prescribes different periods for various rights or claims to be enforced in a court of law. It must be borne in mind that a statute of limitation does not confer a right of action. It is enacted for the purpose of restricting the period within which the right might be asserted (*Luchmee v. Ranjeet* 20 WR (Suth) 375 (PC); and *Osmond v. Kshitish Chandra* 17 CWN 5: 16 CLJ 282: 26 IC 284). The court in *Adnam v. Earl of Sandwich* [1877] 2 QBD 485 states that a party who does not assert his own claim with promptitude has little or no right to seek the aid of the court. It is obvious that the law assists the vigilant and not those who sleep over their rights.

[35] While it is true that *Interscope Versicherung Sdn Bhd* (*supra*) dealt with a limitation issue, the general principle is still relevant to this present situation.

[36] There are a range of situations in which a court's process may be abused and the list is continually evolving based on the situation in each case. In this sense, the court must thoroughly examine all issues that come to its attention before determining whether a particular scenario abuses the court's process. It is imperative that this is done before taking any appropriate action. In *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637, Gopal Sri Ram JCA (as His Lordship then was), on behalf of the Court of Appeal, made the following observations on this issue at p. 541 (CLJ); pp. 645 & 646 (MLJ):

A Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to B do this, the party aggrieved may bring an action based upon the tort of abuse of process.

[37] Considering the issues raised in this court again, it is obvious that non-compliance with procedures clearly falls under the definition of abuse of the court's process. This being the case, this court is of the opinion that C the defendant's failure to seek leave before filing his statement of defence and amended statement of defence amounts to an abuse of the court's process and his defence must therefore be struck out under O. 18 r. 19(1)(d) of the Rules of Court 2012. As per this rule:

D Striking out pleadings and endorsements (O. 18, r. 19)

19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

E (a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

F (d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[38] As it stands in this case, it is evident that the process of the court has been abused by the defendant. In this regard, Ramly Ali JCA (as His G Lordship then was), upon delivering the judgment of the Court of Appeal in the case of *Kerajaan Negeri Kelantan & Anor v. Wong Meng Yit & Ors* [2012] 6 CLJ 357; [2012] 6 MLJ 57, had the following to say at pp. 367 to 368 (CLJ); p. 66 (MLJ):

H [21] In dismissing the applicant's application Hashim Yeop A Sani SCJ held:

> Now we come to the application for leave. The application is under art. 4(4) of the Federal Constitution. Proceedings for declaration under art. 4(4) of the Federal Constitution that a law is invalid on the ground mentioned in cl. 4(3), that is the legislature concerned I has no power to enact it, shall not be commenced without leave of the judge of the Supreme Court.

[22] The 'leave' requirement under art. 4(4) of the Federal Constitution is mandatory. Without the said leave the respondents' OS, which clearly falls under art. 4(3)-(4) of the Federal Constitution, cannot be commenced at all. Therefore the OS filed by the respondents is void and invalid. In other words, the respondents' OS is bound to fail and obviously unsustainable. It is an abuse of the process of the court. On that stand, the said OS ought to be struck out under the O. 18 r. 19(1)(d) of the Rules of the High Court 1980.

[23] On the above considerations, we are of the view that the respondents' OS has failed to comply with the mandatory requirement under art. 4(4) of the Federal Constitution and therefore must fail. On that ground alone, the appeal before us ought to be allowed with costs.

[39] In *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16, Peh Swee Chin SCJ, when addressing the issue of the inherent jurisdiction of the Court to strike out pleadings for abuse of its process, held the following at p. 611 (CLJ); pp. 23 and 24 (MLJ):

It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

[40] Consequently, the plaintiff's application represents a plain and obvious case for the use of a summary procedure to strike out the defendant's defence. In this regard, there will be an incomplete statement if the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 is not referred to. The *locus classicus* of O. 18 r. 19(1) is to be found in the observations made by Mohamed Dzaiddin SCJ (later CJ) at p. 11 (CLJ); p. 43 (MLJ):

The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co* 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Lt*d 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

A

Conclusion

[41] All things considered, this court finds that this is a plain and obvious case of abuse of the court's process. To put it another way, the statement of defence and amended statement of defence should be struck out in this case under the court's inherent jurisdiction. Enclosure 45 is, therefore, allowed with costs of RM5,000, subject to allocatur.

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